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87-782

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-
IN THE UNITED STATES SUPREME COURT
October Term, 1987

JAMES R. WESNER
Appellant

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY,
Appellees

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
PETITION FOR WRIT OF CERTIORARI

Allen K. Neyhard, Esq.
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Watsontown, PA 17777
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(717) 538-9441

I. QUESTION PRESENTED FOR REVIEW

Whether a labor organization and/or the officers thereof violates Sections 101(a)(2), 102, and/or 609 of the Labor Management Reporting and Disclosure Act (29 U.S.C. Sec. 411(a)(2), 412, and 529) by laying off an elected union business agent because of his internal union political activities.

II. PARTIES TO THE PROCEEDING

All parties to this proceeding are those set forth in the above-caption.

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V. OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States District Court, appended hereto, is unreported. The United States Court of Appeals For The Third Circuit did not enter a separate opinion.

VI. STATEMENT OF JURISDICTION

On December 4, 1986, the Honorable William W. Caldwell, United States District Judge for the Middle District of Pennsylvania, entered an Order and Judgment granting Defendants' Motion for Summary Judgment and dismissing the Complaint herein. On June 25, 1987, the United States Court of Appeals for the Third Circuit entered its Judgment denying Appellant's appeal from the aforesaid District Court Order and Judgment. On July 20, 1987, the Third Circuit denied Appellant's Petition For Rehearing. Copies of the foregoing are appended hereto.

Jurisdiction is conferred upon this Court by 28 U.S.C. Sec. 1254(1).

VII. STATUTE INVOLVED

29 U.S.C. Sec. 411(a)(2) Freedom of Speech and Assembly.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. Sec. 412, Civil Enforcement.

Any person whose rights secured by the provisions of this title (29 U.S.C. Sec. 411 - 415) have been infringed by any violation of this title (29 U.S.C.

Sec. 411 - 415 of this title) may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. Sec. 529. Prohibition on certain discipline by labor organization.

It shall be unlawful for any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof, to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of Sec. 102 (29 U.S.C. Sec. 412) shall be applicable in the enforcement of this Section.

VIII. STATEMENT OF THE CASE

At all times relevant to Appellant's cause of action, Appellant was a member of Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local

Union No. 764. Plaintiff was appointed to the position of business agent with the local in 1974 and thereafter was duly elected by members of the Local in 1976, 1979, and 1982.

On or about September 1, 1984, Appellant was laid off from his position as business agent by the Local pursuant to a vote of the Local's Executive Board of which the individual Defendants herein constituted the majority voting in favor of said layoff. Appellant was selected for layoff because the individual Defendants herein believed him to be in opposition to them as officers of Defendant Local Union. Subsequent to his layoff, Appellant remained active in the political affairs of the Local, regularly attending meetings and running for the office of Secretary-Treasurer of the Local in 1985.

IX. BASIS FOR FEDERAL JURISDICTION

Original jurisdiction of this matter was conferred upon the United States District Court by Sec. 102 and 609 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Sec. 412 and 529.

X. REASONS FOR ALLOWANCE OF THE WRIT

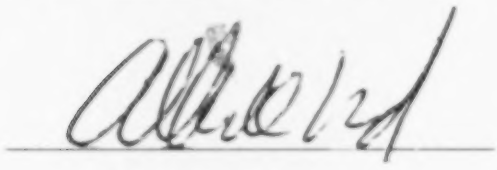
The decision of the Third Circuit that the removal of an elected union officer from office in reprisal for his internal union political activities does not violate the Labor Management Reporting and Disclosure Act is in conflict with the decisions of all other Circuits which have decided this question set forth hereafter. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963); Schonfield v. Penza, 477 F.2d 899 (2d Cir. 1973); Bradford v. Textile Workers of America, AFL CIO, 563 F.2d, 1138 (4th Cir. 1977); Miller v. Holden, 535 F.2d 912 (5th Cir. 1976); Wood v. Dennis, 489 F.2d 849 (7th Cir. 1973); Grand Lodge v. King, 335 F.2d 340 (9th Cir. 1964); Cert. den. 379 U.S. 920; and Lamb v. Miller, 660 F.2d 792 (DC Cir. 1981).

This Court has held that newly elected union officials may terminate solely because of political affiliation appointed officials from the prodecessor administration without violating the Labor Management Reporting and Disclosure Act. Finnegan v. Leu, 456 U.S. 431 (1982). Whether elected union officials may be terminated because of internal politics is an

equally important question of federal law which has not been, but should be, settled by this Court.

Respectfully Submitted,

ON BEHALF OF APPELLANT:



Allen K. Neyhard, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES R. WESNER, Plaintiff	:	
vs.		
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY, Defendants	:	CIVIL ACTION NO. 86-0021

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ORDER AND JUDGMENT

AND NOW, this 4th day of December, 1986, it is ordered that:

1) Defendants' motion for summary judgment is granted and judgment is hereby entered for defendants.

2) The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES R. WESNER,
Plaintiff

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY,
Defendants

: CIVIL ACTION NO. 86-0021

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MEMORANDUM

Introduction

Plaintiff initiated this action under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 et seq., alleging that the termination of his employment as a business agent for defendant, Local No. 764 was unlawful. (1)Defendants have moved for summary judgment pursuant to Fed. R. Civ. P. 56. They contend (1) that plaintiff's case is barred by

(1) The complaint also sets forth several state law claims. Because we will dismiss the federal cause of action, we will also dismiss the state law claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 16 L.Ed. 2d 218, 86 S.Ct. 1130 (1966).

1(a)

the applicable statute of limitations and (2) that plaintiff has failed to state a cause of action under the LMRDA. For the reasons which follow, we will grant defendants' motion for summary judgment.

Background

Plaintiff, James Wesner was first appointed to the position of business agent in 1974. Thereafter, in 1976, 1979 and 1982, he was elected to that post by members of Local No. 764. At the time of his election in 1982, he was one of four business agents employed by the Local. However, on September 1, 1984, plaintiff's position was eliminated pursuant to a vote of the Local's Executive Board. The purported reason for this action was the Local's belief that economic conditions necessitated a reduction in the number of business agents. Plaintiff concedes that the Local was experiencing financial difficulties, but maintains that he was selected for termination because of his political opposition to the leadership of the Local. In support of his contention, he points to the fact that at least one of the business agents retained by the Local had less seniority.

On September 8, 1984 plaintiff initiated the first of two unsuccessful appeals to the Joint Council No. 53 and

1(b)

to the General Executive Board of the International Union. He received a final notice of denial on July 11, 1984. Having exhausted his internal union remedies, plaintiff then filed this complaint on January 8, 1986. He, however, did not serve the complaint on the individual defendants until January 13, 1986.

Discussion

A. Summary Judgment Standard

We must evaluate defendants' motion for summary judgment under the following, well established standard:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there in no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970) and must resolve all reasonable doubts as to the existence of a genuine issue of material fact against the movant.
>
> Hersh v. Allen Products Company, Inc., 789 F.2d 230, 232 (3d Cir. 1986).

B. Statute of Limitations Defense

Actions brought under the LMRDA are governed by the six-month statute of limitations set forth in § 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b). [2] Steelworkers Local 1397 v. United

Steelworkers of America, 748 F.2d 180 (3d Cir. 1984). As interpreted by the Third Circuit in West v. Conrail, 780 F.2d 361 (3d Cir. 1985), §10(b) requires that both the filing and the service of the complaint must occur within the limitations period.

In the present case, defendants argue that plaintiff's action is time barred because service of the complaint was not made on them during the limitations period. More specifically, they assert that the last day service could have been made was Saturday, January 11, 1986, and hence plaintiff's service on Monday, January 13, 1986 was untimely.

Defendants' argument fails because Fed. R. Civ. P. 6(a) specifically provides that the last day for performing a required act cannot fall on a Saturday, Sunday or legal holiday:

> (a) Computation. In Computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of

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(2) Section 10(b) provides in pertinent part:
That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the

armed forces, in which event the six-month period shall be computed from the day of his discharge. 29 U.S.C. § 160(b).

time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

We conclude that plaintiff's service of the complaint on Monday, January 13, 1986 was within the limitations period.

C. LMRDA Claim

As to the merits, plaintiff alleges that his termination from office violated the LMRDA in that his right to freedom of speech protected by § 101(2) of the Act was infringed. (3) In this regard, plaintiff claims he has been deprived of employment as a union officer in retaliation for his political opposition to the leadership of the Local. Defendants contend

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(3) Section 101(2) provides as follows:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or

upon any business properly before the meeting, subject to the organization's established and reasonable rules to the conduct of the meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
29 U.S.C. § 411(2).

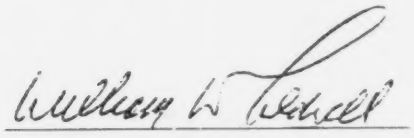
that plaintiff's allegations do not state a claim under the LMRDA because it provides no protection to union officials who are removed from office.

It is well settled in the Third Circuit that the LMRDA does not afford a remedy to a union officer who is removed from his office prior to the expiration of his term. Sheridan v. United Brotherhood of Carpenters, 306 F.2d 152 (3d Cir. 1962). "It is the union-member relationship, not the union officer or union-employee relationship, that is protected." Id. at 157. Since it is the union-member relationship which is protected, a union official must demonstrate that his rights as a union member have been violated in order to recover under the LMRDA. See Martire v. Laborers' Local Union 1058, 410 F.2d 32 (3d Cir.), cert. denied, 396 U.S. 903, 24 L.Ed.2d 179, 90 S.Ct. 216 (1969). The issue before us then is whether plaintiff's assertion that he has been denied his right to free speech is sufficient to state a cause of action under the LMRDA.

In order to give rise to a free speech claim under

the LMRDA, plaintiff must allege that his dismissal was "part of a purposeful and deliberate attempt . . . . to suppress dissent within the union." Schonfeld v. Penza, 477 F.2d 899, 904 (2nd Cir. 1973). [4]No such allegations are made in the present action. There is no claim that the membership of the union has likewise been subjected to repression by defendants or that defendants have instituted a plan or scheme to suppress the free speech of the membership. Instead, plaintiff's allegations only pertain to actions taken against him personally. As a result, we conclude that plaintiff has not made out a cause of action under the LMRDA. Accordingly, we will grant summary judgment in favor of defendants.

We will issue an appropriate order.



William W. Caldwell
United States District Judge

Date: December 4, 1986

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[4] The Schonfeld test was cited with favor by United States Supreme Court in Finnegan v. Leu, 456 U.S. 431, 72 L.Ed.2d 239, 102 S.Ct. 1867 (1982) and was utilized by the courts in Adams-Lundy v. Association of Professional Flight Attendants, 731 F.2d 1154 (5th Cir. 1984) and in Collins v. Pennsylvania Telephone Union, Local No. 1944, 431 F.Supp. 842 (W.D. Pa. 1977).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5016

WESNER, James R.,
Appellant

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
LOCAL UNION NO. 764 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
GREENAWALT, Charles E., JOHNSON, Robert L., FISHER, Robert B., Jr., REGOPOULOS, Paul K., Jr., REIGEL, Kenneth E., and MONTGOMERY, Samuel

---

Appeal from the
United States District Court
for the Middle District of Pennsylvania
— Scranton
(D.C. Civil No. 86-0021)
District Judge:
Honorable William V. Caldwell

Submitted Pursuant to
Third Circuit Rule 12 (6)
June 19, 1987
Before:
SEITZ, MANSMANN, Circuit Judges,
and BISSELL, District Judge*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania — Scranton and was submitted under Third Circuit Rule 12(6) on June 19, 1987.
*Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on December 4, 1986, be and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

Clerk

June 25, 1987

Costs taxed in favor of appellees as follows:

BRIEF $52.50

Certified as a true copy and issued in lieu of a formal mandate on July 28, 1987

Test:

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5016

James R. WESNER,
Appellant

vs.

International Brotherhood of Teamsters, etc.

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and GREENBERG,
Circuit Judges,
and BISSELL, District Judge.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los [illegible]

Circuit Judge

DATED: July 20, 1987

* Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

UNITED STATES SUPREME COURT

JAMES R. WESNER
Appellant

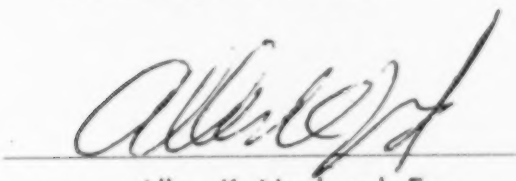
vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY,
Appellees

CERTIFICATE OF SERVICE

AND NOW, this 13th day of October, 1987, I, Allen K. Neyhard, Esq., Attorney for Appellant, hereby certify that I served three (3) copies of the foregoing Petition For Writ Of Certiorari by depositing the same in the United States mail, postage prepaid, in the post office at Watsontown, Pennsylvania, addressed to, by first class mail:

Ira H. Weinstock, P.C.
800 North Second Street
Harrisburg, PA 17102



Allen K. Neyhard, Esq.

Supreme Court, U.S.
FILED
DEC 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-782

In The

United States Supreme Court

October Term, 1987

JAMES R. WESNER

vs.

Appellant

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, CHARLES E. GREENAWALT, ROBERT L. JOHNSON, ROBERT B. FISHER, JR., PAUL K. REGOPOULOS, JR., KENNETH E. REIGEL, and SAMUEL MONTGOMERY,

Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ira H. Weinstock, Appellees' Counsel of Record
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660 F.2d 792 (D.C. Cir. 1981) 3
Schonfeld v. Penza,
477 F.2d 899 (2nd Cir. 1973) 2
Wood v. Dennis,
489 F.2d 849 (7th Cir. 1973) 3

OPINIONS DELIVERED IN THE COURTS BELOW

Contrary to the representations of the Appellant in its Petition for Writ of Certiorari, the United States Court of Appeals for the Third Circuit did, in fact, file a Memorandum Opinion in this matter. A true and correct copy of that Opinion is attached to this brief as Appendix 1.

STATEMENT OF THE CASE

The Appellees contest the sentence in the Appellant's rendition of the facts that states as follows: "Appellant was selected for layoff because the individual Defendants herein believed him to be in opposition to them as officers of Defendant Local Union". Such statement is a legal conclusion, not a fact considered by the courts below in assessing the validity of summary judgment. The relevant fact conceded by the Appellant is that the Defendant Local Union was experiencing financial difficulties at that time. The legal argument made by the Appellees was that such financial difficulties necessitated a reduction in the number of business agents and resulted in the Appellant's layoff. The legal argument made by the Appellant was that he was chosen to be laid off because of his political opposition to the individual Appellees.

In its Memorandum Opinion in this matter, the Third Circuit stated that "it is undisputed that subsequent to his removal . . ., Mr. Wesner remained active in the political affairs of the local, regularly attending meetings and running for elected office." The Third Circuit also noted that the Appellant here "concedes that

he has actively participated in union politics since his layoff, including running for executive office."

REASONS FOR DISALLOWANCE OF THE WRIT

The Appellant's Petition for Writ of Certiorari misstates the holding of the Third Circuit in this matter and mischaracterizes the current state of law in the Circuits with respect to the applicability of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Sec 411(a)(2), 412 and 529, (hereinafter the "LMRDA") to elected union officers.

The Third Circuit in this matter did not state that the termination of an elected union officer in reprisal for his internal union political activities does not violate the LMRDA. Rather the precise holding of the Third Circuit was that the Appellant failed to make out a triable cause of action on the issue of whether his layoff "was part of a purposeful and deliberate attempt to suppress dissent within the Union." The quoted language of the Third Circuit in its decision in this case was a paraphrase of language in the decision of *Schonfeld v. Penza,* 477 F.2d 899 (2nd Cir. 1973). In that decision, the Second Circuit held that, although the LMRDA imparts no rights to a deposed union officer by virtue of his status as a union *officer*, the deposed officer can make out an LMRDA cause of action as a union *member* by showing a deliberate attempt by union officials to suppress dissent within the union.

Despite the clear holding of *Schonfeld v. Penza, supra,* the Appellant inexplicably lists the Second Circuit as being in conflict with the Third Circuit with respect to the

applicability of the LMRDA when an officer loses his job. Similarly, the Appellant mischaracterizes the law of the Fifth Circuit and the Seventh Circuit. See *Adams-Lundy v. Flight Attendants,* 731 F.2d 1154 (5th Cir. 1984) and *Wood v. Dennis,* 489 F.2d 849 (7th Cir. 1973). Moreover, the decision of the Ninth Circuit in *Grand Lodge v. King,* 335 F.2d 340 (9th Cir. 1964), involving an appointed union officer, can hardly be considered a viable precedent after this Court's decision in *Finnegan v. Leu,* 456 U.S. 431 (1982). In *Lamb v. Miller,* 660 F.2d 792 (D.C. Cir. 1981), the precise holding of the court was that summary judgment is improper in an LMRDA action where an union officer who had been dismissed presents sufficient evidence alleging that the dismissal was due to political motivations. The Court acknowledged, however, that the LMRDA violation occurs because of interference with the unions officer's democratic rights as a member of the union rank-and-file. Finally, in *Bradford v. Textile Workers of America, AFL-CIO,* 563 F.2d 1138 (4th Cir. 1977), the Fourth Circuit held that an elected union officer could use the LMRDA to seek redress for a dismissal when the evidence proved that the dismissal was in retaliation for an exercise of his free speech rights. But, again, the court stated that " . . . a union member, by accepting an elected office in the union, does not forfeit his rights expressly given him *as a union member* under the Act and is entitled to be protected from 'discipline' . . . in connection with his union office." 563 F.2d at 1142 (emphasis added).

As demonstrated above, it is arguable whether there ever existed in the Circuits a conflict over the precise question of whether a union officer is entitled to special LMRDA protections above and beyond the protections

afforded him by virtue of his status as a union member. To the extent that there was a conflict on this point, however, it was resolved by this Court in *Finnegan v. Leu*, 546 U.S. 431 (1982), wherein it was stated that "it was rank-and-file union members - not union officers or employees as such - whom Congress sought to protect [by enacting the LMRDA]." 456 U.S. at 437 (footnote deleted).

For all of the foregoing reasons, the Appellees respectfully submit that this Court should disallow the writ. It is settled law in every Circuit that a union officer who is discharged by the union can make out a cause of action under the LMRDA only by setting forth sufficient evidence showing that the union infringed the rights guaranteed to him as a union member by the LMRDA. To have withstood the summary judgment motion in this case, the Appellant had to present sufficient evidence that his layoff was part of a purposeful and deliberate attempt to suppress dissent within the union. He did not do so. On the contrary, the Appellant conceded as a fact that, after his layoff, he remained active in intra-union political affairs and even ran for office. The thrust of his case is that, simply because he was laid off as an officer and simply because he was a political opponent of the individual Appellees, he makes out a triable LMRDA cause of action. That approach is contrary to the settled law of this Court. Accordingly, the writ should be disallowed.

Respectfully Submitted
ON BEHALF OF APPELLEES:

By: Ira H. Weinstock Gerard M. Mackarevich

IRA H. WEINSTOCK
Counsel of Record

GERARD M. MACKAREVICH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5016

WESNER, James R., *Appellant*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, GREENWALT, Charles E., JOHNSON, Robert L., FISHER, Robert B., Jr., REGOPOULOS, Paul K., Jr., REIGEL, Kenneth E., and MONTGOMERY, Samuel

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Appeal from the United States District Court
for the Middle District of Pennsylvania - Scranton
(D.C. Civil No. 86-0021)
District Judge: Honorable William V. Caldwell

Submitted Pursuant to Third Circuit Rule 12(6)
June 19, 1987
Before: SEITZ, MANSMANN, *Circuit Judges,*
and BISSELL, *District Judge**
(Filed June 25, 1987)

MEMORANDUM OPINION OF THE COURT

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*Honorable John W. Bissell of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX 1

MANSMANN, *Circuit Judge.*

This is an appeal from the district court's grant of summary judgment for the defendant International Brotherhood of Teamsters on the ground that the plaintiff had failed to state a cause of action under the Labor Management Reporting and Disclosure Act ("LMRDA"), 27 U.S.C. §401 *et seq.* For the reasons stated below we will affirm the judgment of the district court.

I

The plaintiff, James Wesner, is a member of the International Brotherhood of Teamsters. He was first appointed to the position of business agent in 1974, and was subsequently elected to that position in 1976, 1979 and 1982, by members of Local No. 764. In 1982 he was one of four agents employed by the local. On September 1, 1984, the plaintiff's position was eliminated pursuant to a vote of the local's Executive Board, which maintains that the action was taken due to economic conditions necessitating a reduction in the number of business agents.

The plaintiff contends that he was chosen for termination because of his political opposition to the local's leadership. He concedes that the local was experiencing financial difficulties at that time.

After his termination Mr. Wesner sought relief through the internal channels of the union, but was unsuccessful in two appeals. After exhausting his internal remedies, he sought relief in the federal courts. Summary judgment was granted for the defendant, and the plaintiff has appealed.

Our standard of review of a motion for summary judgment is well established. Summary judgment shall be granted if there is no genuine issue as to any

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material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We are required to apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources must be viewed in the light most favorable to the party opposing the motion. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976) *cert. denied.* 429 U.S. 1038 (1977).

II

It has long been established in this circuit that neither Title I nor §609 (29 U.S.C. §529) of the LMRDA affords an elected union official as a remedy for his removal from office prior to the expiration of his term. *See Martine v. Laborer's Local Union* 1058, 410 F.2d 32 (3d Cir. 1969); *Sheridan v. United Brotherhood of Carpenters*, 306 F.2d 152 (3d Cir. 1962). The rationale for this rule is that the Labor Management Reporting and Disclosure Act is intended to protect the union-member relationship, and not the union-officer, or union-employee relationship. *Martine,* F.2d at 35. Moreover, the Supreme Court held recently, "[i]t is readily apparent, both from the language of these provisions [29 U.S.C. §411(a)(1) and (2), 529] and from the legislative history of Title I, that it was rank-and-file union members - not union officer or employees, as such — whom Congress sought to protect." *Finnegan v. Leu*, 456 U.S. 431, 436-437 (1982). Although *Finnegan* dealt directly with *appointed* union officers, the court made it clear that discharge from union employment which does not impinge upon the incidents of union membership as such was not protected. In *Martine*, we further noted that if a penalty were imposed upon a union officer which affected his status *qua* union member, then the LMRDA would afford the member a remedy.

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In this case, it is undisputed that the plaintiff was an elected official, having attained the status of business agent. Further, it is undisputed that but for the action of the Local's Executive Board, on September 1, 1984, the plaintiff would have retained his position as business agent until January 12, 1986. Finally it is undisputed that subsequent to his removal from the position of business manager, Mr. Wesner remained active in the political affairs of the local, regularly attending meetings and running for elected office.

Under this set of facts, we cannot find that the union-member relationship protected by the LMRDA was violated. No denial of Mr. Wesner's rights or abridgement of his status as a union member occurred. *See Martine*, 410 F.2d 32. Therefore, Mr. Wesner's layoff did not violate the LMRDA.

Mr. Wesner maintains nonetheless that it is his removal for voicing opposition to other office holders which differentiates his case, and provides him a remedy under the LMRDA. However, in order to maintain a free speech claim, the plaintiff must allege that his dismissal was part of a purposeful and deliberate attempt to suppress dissent within the union. *Adam S. Lundy v. Association of Professional Flight Attendants*, 731 F.2d 1154 (5th Cir. 1984); *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); *Collins v. Pennsylvania Telephone Union, Local No. 1944*, 431 F. Supp. 842 (W.D. Pa. 1977).

We find no such allegations arising from the circumstances presented from this case. Indeed, plaintiff concedes that he has actively participated in union politics since his layoff, including running for executive office. Therefore, we cannot say that the plaintiff has made out a cause of action under the LMRDA.

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Accordingly, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

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CERTIFICATE OF SERVICE

AND NOW, this 10th day of December, 1987, I, Ira H. Weinstock, Counsel of Record for Appellees, hereby certify that I served three (3) copies of the foregoing **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** by depositing the same in the United States mail, postage prepaid, in the post office at Harrisburg, Pennsylvania, addressed to, by first class mail:

Allen K. Neyhard, Esquire
3 West First Street
P.O. Box 265
Watsontown, Pennsylvania 17777

By: Ira H. Weinstock
IRA H. WEINSTOCK

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